

Fair Political Practices Commission
MEMORANDUM

To: Chairman Randolph and Commissioners Blair, Huguenin, Leidigh,
and Remy

From: Emelyn Rodriguez, Commission Counsel
John Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Subject: Non-Enforceable Pledges as Campaign Contributions

Date: December 29, 2006

I. EXECUTIVE SUMMARY

Under existing law, *an enforceable written promise* to contribute a specified sum of money is considered a contribution as of the date the promise is made, and is reportable in the same manner as any contribution of a like amount on the same date. The Act does not treat non-enforceable promises in this manner. Rather, regulation 18216 expressly excludes campaign pledges from classification as “enforceable” promises for timing and reporting purposes.

Earlier this year, a newspaper article criticized the current definitions, suggesting abuse of contribution pledges. The article also quoted from watchdog groups that proposed making pledges reportable, whether considered an enforceable promise or not.

At the October 2006 meeting, the Commission decided to review the issue and instructed staff to present an issues memorandum on this topic in order to help determine whether further consideration of the issue is warranted.

This issues memorandum provides background regarding current state law and the Commission’s existing policies with regard to campaign pledges. In addition, this memorandum discusses different approaches used by the federal government, and other states, as well as policy considerations and options the Commission may want to consider with regard to this issue.

II. HISTORY

The Act defines “contribution” to include a “payment, a forgiveness of a loan, a payment of a loan by a third party, or *an enforceable promise to make a payment* to the extent that full and adequate consideration is received, unless it is clear from the surrounding circumstances that it is not made for political purposes.” (Section 82015, emphasis added.)

The Commission regulation defining the term “enforceable promise to make a payment” was adopted in 1987. The Commission, at its January 1987 meeting, directed staff to develop a regulation defining the term because, at the time, no further guidance was provided regarding its meaning.¹ In addition, Commission advice letters, manuals, and forms had recognized that an “enforceable promise to pay” was a contribution. However, they referred to an enforceable promise to make a contribution in the future as a “pledge.”² The term “pledge” does not appear in the Act, and at the time, was not defined in the Commission’s regulations.

Staff presented regulation 18216 for prenotice discussion at the Commission’s September 9, 1987 meeting. The Commission approved the regulation, defining the term “enforceable promise to make a payment” at its December 1, 1987 meeting. Regulation 18216 provided that a person makes an “enforceable promise to make a payment” if he or she:

- (1) Guarantees a loan.
- (2) Furnishes security for a loan.
- (3) Endorses a loan.
- (4) Cosigns a loan.
- (5) Makes and delivers a post-dated check.
- (6) Establishes a line of credit at a bank or other commercial lending institution for a candidate or committee.
- (7) Promises in writing to make a payment for specific goods or services, and the candidate or committee, based on the promise, expends specific funds or enters into an enforceable contract with a third party.

These transactions would be considered contributions, and the regulation would require that these transactions be reported in accordance with campaign disclosure provisions of the Act. These transactions were considered “enforceable promises to make a payment” because consideration or something of value was received for the promise, or there was detrimental reliance on the promise.

The regulation also specified what types of transactions would *not* be considered enforceable promises to make a payment.

These included:

- (1) Signing a pledge card or similar document.
- (2) Agreeing orally or in writing to make a future payment not specifically identified in the regulation as an “enforceable promise.”

¹ At the January 1987 meeting, staff requested the Commission’s guidance on whether to consider changing past advice about a specific type of promise— a loan guarantee—which, at the time, was not considered an enforceable promise to make a payment. The Commission subsequently directed staff to write a regulation addressing the specific issue with regard to loan guarantees, as well as specifying generally, what constitutes an enforceable promise to pay. (Commission Meeting Minutes, September 9, 1987.)

² *Combs* Advice Letter, No. A-80-03-018 and *Schmechel* Advice Letter, No. A-76-06-014.

Regulation 18216 has remained virtually unchanged since it was adopted in 1987. However in 1988, the Commission's "pledge" schedule (Schedule D) in the campaign reporting forms which required that "enforceable promises" or "enforceable pledges" were reportable was renamed "Enforceable Promises" to make the requirement clearer and to remove the ambiguity associated with the undefined term "pledge."

As the result of a campaign "simplification" project in the late 1990s, it was decided that enforceable promises should no longer be disclosed on a separate schedule but were rolled into standard "contribution" disclosure since these promises were essentially a subtype of contribution under the definition in section 82015. Consequently, manuals today instruct committees to disclose enforceable promises on Schedule A (monetary contributions) or Schedule C (nonmonetary contributions) with an appropriate description.

III. STATUTORY BACKGROUND

This section provides a summary of the statutory background supporting the Commission's actions relating to regulation 18216.

Under current law, a promise to make a payment must be enforceable in order for the payment to be considered a contribution, and thus subject to campaign disclosure provisions of the Act. (Section 82015.)

What is "An Enforceable Promise to Pay"?

Generally, a promise is not enforceable unless consideration³ is received for it, or there is detrimental reliance on it.⁴ Therefore, unless the beneficiary of the promise takes action in reliance on the promise, a promise without consideration is revocable, and therefore, unenforceable.⁵ For instance, a promise or pledge to make a gift (a donative promise) is generally unenforceable.⁶

³ Consideration is something of value received by a promisor, or a third person, from a promisee. (*Adolph Ramish v. Woodruff* (1934) 2 C.2d 190, 207.) It may be an act, forbearance, change in legal relations, or a promise. (1 Witkin Sum. Cal. Law Contracts § 202.)

⁴ *Board of Home Mission v. Manley* (1933) 129 Cal. App. 541, 543. The general rule regarding detrimental reliance is that one who makes a promise upon which another justifiably relies may be bound to perform it, despite lack of consideration; i.e., the estoppel is a substitute for consideration. Witkin, *Summary of California Law*, 10th Edition, Contracts § 244. Examples of detrimental reliance include expenditure of specific funds or entering into an enforceable contract with a third party for goods or services based on anticipated receipt of promised funds or other payment.

⁵ 1 Witkin, *Summary of Cal. Law* (10th ed. 2006) Contracts, § 203.

⁶ 1 Witkin, *supra*, § 202.

The Commission has applied these legal principles in crafting regulation 18216, which details specific transactions that are considered “enforceable promises to pay,” and transactions which are not considered enforceable promises.

The adoption memorandum for regulation 18216 stated that:

“In staff’s experience, loan guarantees and similar transactions are the most common examples of enforceable promises in political campaigns. For instance, a contract guaranteeing a loan is generally an enforceable promise to make a payment...Post-dated checks and lines of credit established at a bank by a third party for a candidate or committee are two other typical examples of transactions which are enforceable promises to pay. A less common type of promise is a third party’s promise to a candidate or committee to pay for specific goods or services, on the basis of which the candidate or committee expends specific funds or enters into an enforceable contract with another party.”⁷

In contrast, a pledge was cited as an example of a transaction that was *not* an enforceable promise to pay. In making this distinction, staff noted that, “The mere fact that a person signs a pledge card does not make the pledge enforceable.”⁸ Staff also emphasized known problems related to campaign pledges. “In the past, some candidates have tried to use pledge cards to inflate their financial strength. These candidates have reported the amounts pledged but not actually contributed to deter others from running for the same office. Any definition of ‘enforceable promises’ should clearly state that pledge cards and similar transactions are not reportable.”⁹

Federal and State Laws, Model Rules

Federal and state reporting laws vary widely in both the type and level of detail they require. The Commission’s regulation regarding pledges as non-enforceable promises to make a payment is consistent with federal rules. Under the Federal Election Campaign Act of 1971 (as amended), a pledge or a mere promise to make a campaign contribution, is not considered a contribution, and is therefore not reportable.¹⁰

⁷ Legal Counsel Kathryn E. Donovan, Memorandum to Commissioners, “Adopt Regulation 18216 Definition of ‘Enforceable Promise to Make a Payment’” November 23, 1987, p. 3.

⁸ Legal Counsel Kathryn E. Donovan, memorandum to Commissioners, “Adopt Regulation 18216 Definition of ‘Enforceable Promise to Make a Payment’” *supra*.

⁹ Legal Counsel Kathryn E. Donovan, memorandum to Commissioners, “Adopt Regulation 18216 Definition of ‘Enforceable Promise to Make a Payment’” *supra*.

¹⁰ 2 U.S.C.S. § 431; Federal Election Commission Advisory Opinion, No. 1985-29, which stated that prior to January 8, 1980, the Federal Election Campaign Act of 1971 defined contribution to include “a written contract, promise, or agreement, whether or not legally enforceable, to make a contribution.” However, the federal rules were amended in 1979, and parts were repealed including a portion of the contribution definition while retaining similar definitional language for the term “expenditure” under 2

In contrast, some states like Texas—which defines “contributions” much more broadly than California—require the reporting of campaign pledges.¹¹ Under Texas law, for instance, a promise or pledge to give money to a candidate is considered a campaign contribution that is subject to reporting rules. If a filer accepts such a promise or pledge, he or she must report it on a reporting schedule for “pledges.” Also, once a pledge is reported, it is not required to be re-reported upon receipt. In addition, if the filer never receives the pledge, the filer does not amend his or her report.¹²

New Jersey also requires the reporting of pledges on campaign statements, whether enforceable or not. The state statutes define “contribution” broadly to include “all loans and transfers of money or other thing of value...and all pledges or other commitments or assumptions of liability to make any such transfer...”¹³

Public interest and governmental ethics groups have also weighed in on the issue. Some groups have even drafted model campaign finance rules that would require the reporting of pledges.

For instance, the Center for Governmental Studies in partnership with the California Voter Foundation and UCLA School of Law authored the “Campaign Finance Disclosure Model Law.” This model law defines contribution broadly as “a written contract, promise, or agreement to make a contribution...”¹⁴ However, in the section describing contents of campaign statements, the model rules specify that the type of pledges that are required to be reported are “*written promises or enforceable pledges* to

U.S.C.S. § 431(9)(A)(ii). The effect of the repeal was that a mere promise to make a contribution is not itself subject to the Federal Election Campaign Act as a contribution.

¹¹ Under Texas law, contributions are defined as “a direct or indirect transfer of money, goods, services, or any other thing of value and includes an agreement made or other obligation incurred, whether legally enforceable or not, to make a transfer.” (Tex. Elec. Code § 251.001(2).)

¹² “Campaign Finance Guide for Candidates and Officeholders who file with the Texas Ethics Commission” (revised September 21, 2006), pg. 8, at <<http://www.ethics.state.tx.us/filinginfo/cfpub.htm>> [as of Dec. 13, 2006].

¹³ The New Jersey Campaign Contributions and Expenditures Reporting Act, L.1973, c.83, as amended, N.J.S.A. 19:44A-1; State regulations also include enforceable and non-enforceable pledges in the definition of contribution which “includes every loan, gift, subscription, advance or transfer of money or other thing of value, including any, in-kind contribution, made to or on behalf of any candidate committee, joint candidates committee, political committee, continuing political committee, political party committee or legislative leadership committee and *any pledge* or other commitment or assumption of liability to make such transfer.” N.J. A.C. 19:25-1.7.

¹⁴ “Campaign Finance Disclosure Model Law,” written by Center for Governmental Studies in partnership with California Voter Foundation and UCLA School of Law (June 2004), page 4, at <http://www.cgs.org/publications/docs/ModelDisclosureLaw.pdf> [as of Dec. 13, 2006].

make a contribution.” These pledges are to be “*reported separately* in the same manner as other monetary contributions.”¹⁵ (Emphasis added.)

Bob Stern, president of the Center for Governmental Studies, stated that while it is not clear whether the group’s model law requires non-enforceable pledges to be reportable, it is “my strong preference is to say that only enforceable promises to pay should be reportable.”¹⁶

The COGEL (The Council on Governmental Ethics Laws) Model Law on Campaign Finance Reporting, states similarly that “written promises or pledges to make a contribution shall be reported separately in the same manner as other monetary contributions.”¹⁷ It is unclear whether the group’s definition of “pledge,” means an enforceable promise to make a payment.

IV. STATUTORY CONSTRUCTION

This section discusses whether the Commission may take further action relating to campaign pledges. Staff does not believe that the Commission has authority to include non-enforceable pledges in the definition of campaign contribution.

Agencies, like courts, are subject to common rules of statutory construction when faced with the task of interpreting and applying the law. The proper approach to construing a statute is succinctly outlined by *Estate of Griswold* (2001) 25 Cal.4th 904, 911, as follows:

“We begin by examining the statutory language, giving the words their usual and ordinary meaning. [Citations omitted.] If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. [Citations omitted.] If there is ambiguity, however, we may then look to extrinsic sources, including the ostensible objects to be achieved and the legislative history. [Citation omitted.] In such cases, we select the construction that comports most closely with the apparent intent of the Legislature, with a view of promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.”

¹⁵ “Campaign Finance Disclosure Model Law,” Center for Governmental Studies, *supra*, page 31.

¹⁶ Electronic message from Robert M. Stern, president, Center for Governmental Studies, Dec. 12, 2006.

¹⁷ “COGEL Model Law on Campaign Finance Reporting,” § 134.01 Basic Reporting Form.

Therefore, if the statute has an unambiguous meaning, then the “plain meaning” is applied and the interpretational task requires nothing further.

Section 82015 provides:

“(a) ‘Contribution means a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment except to the extent that full and adequate consideration is received, unless it is clear from the surrounding circumstances that it is not made for political purposes.’”

The language of section 82015 clearly specifies that only “an enforceable promise to make a payment” is considered a “contribution.” Because the plain meaning of the text is clear and unambiguous, and no other interpretation is viable, no further analysis is necessary. Indeed, where the language of a statute is clear, its plain meaning should be followed. (*Great Lakes Properties v. City of El Segundo* (1977) 19 Cal.3d 152, 155.)

Thus, staff’s view is that under the current definition of “contribution,” the Commission may not regulate pledges or non-enforceable promises to make a payment, and that the existing regulation reflects what may be accomplished under the current statute. However, should the Commission decide on a policy level that it wishes to pursue changes in this area, it may do so on a legislative basis. The next section discusses various options and policy considerations.

V. OPTIONS AND POLICY CONSIDERATIONS

There are various arguments for or against requiring the reporting of non-enforceable pledges. On one hand, some public interest groups have argued that reporting of such pledges would increase governmental transparency by allowing interested persons to keep track of money promised by special interests groups trying to gain political influence over elected officials. In addition, requiring the reporting of non-enforceable pledges would increase timeliness of disclosure by preventing politicians from delaying the reporting of how much money they take from special interests.¹⁸

On the other hand, requiring the reporting of non-enforceable pledges could lead to other campaign abuses (i.e. candidates inflating contribution amounts through pledges

¹⁸ Under state law, non-enforceable pledges are not contributions, and therefore, not reportable. Contributions are reportable as received on the date the candidate or committee, or agent of the candidate or committee, obtains possession or control of the funds. (Regulation 18421.1.) In August 2006, The Orange County Register alleged pledging abuses by politicians who delay publicly disclosing who gives them money by accepting pledges instead of cash. The newspaper cited 14 examples of lawmakers holding fundraisers in August 2006 but reporting no new contributions the next day. The newspaper contended that contributions were not reported because attendees delayed reporting by promising to pay later. Note, however, that it is also possible that a donor may have sent payment in advance of the event, and would therefore have no further contributions to report after the fundraiser.

in order to discourage likely opponents from running against them)¹⁹ and could lead to inaccurate reporting of contribution receipt dates and actual amounts received because contributors may change their minds at any time, and may not follow through on a pledge.

The Commission has several options. They include the following: (1) The Commission may choose keep the status quo and not require the reporting of non-enforceable pledges; (2) The Commission may pursue legislative action to require the reporting of non-enforceable pledges as contributions; (3) The Commission may pursue legislative action to require the reporting of non-enforceable pledges in a separate schedule in campaign reports that does not impact a candidate or committee's overall contribution amount.

Should the Commission decide as a policy matter that it wishes to require the reporting of non-enforceable pledges, such as proposed in options 2 and 3, legislative action would be necessary due to the definition of contribution under section 82015 (which specifically refers to "an enforceable promise to make a payment").

VI. CONCLUSION

Under current state law, only enforceable promises to make a payment qualify as contributions. The Commission's regulations expressly exclude non-enforceable pledges from classification as contributions. Therefore, under current law these pledges are not reportable nor subject to requirements of the Act. The Commission may choose to keep the status quo, or it may decide on a policy level that it wishes to seek legislative action to require the reporting or disclosure of non-enforceable pledges. Should the Commission decide to pursue changes in this area, it should seek a legislative solution.

¹⁹ Campaign abuses related to pledges was apparently a significant enough problem when regulation 18216 was being drafted, that the adoption memorandum specifically mentioned it as a reason for excluding unenforceable pledges from reportable contributions. (Legal Counsel Kathryn E. Donovan, mem. to Commissioners, "Adopt Regulation 18216 Definition of 'Enforceable Promise to Make a Payment'" *supra*.)